meeting. T. 1793; 2024. Harley found Saporito in the I&C shop around 5:00 PM and told him that Odom wanted to meet with him to discuss Saporito's safety concerns. Saporito at first replied that he did not have any safety concerns. T. 1794. Harley told Saporito to be prepared to holdover (stay at work beyond his regular quitting time) to attend the meeting with Odom. Saporito then said he would not holdover because he had to attend to personal family business. *Id.* Harley told Kappes that Saporito said he did not have any nuclear safety concerns and refused to holdover for the meeting . T. 1795; 2024.

When Kappes told Odom about Saporito's response, Odom said he still wanted to have the meeting. Kappes then went to the I&C shop and told Saporito to come tot the meeting with Odom. T. 2025. Saporito at first refused to come to the meeting, reiterating that he had personal family matters to address. T. 2026. When Kappes again ordered Saporito to holdover for the meeting, Saporito said he was sick and would not stay. T. 2027; RT. 119-120. After Saporito refused several times to holdover, Kappes told Harley that Saporito was suspended until further notice for defying an order, and that Harley was to take Saporito to the gate and take his badge. T. 2027-29. This incident occurred at about 5:15 or 5:20 PM on November 30. T. 2030.

When Kappes told Odom about this incident, Odom believed he had to support Kappes in his disciplining of Saporito for his act of "gross insubordination." RT. 121. However Odom also felt that it was necessary for Saporito to return to the plant so that he could continue talking with the outside investigators. T. 1453. Odom told Kappes to hold the suspension in abeyance and get Saporito back to the plant. T. 2034. Kappes called Saporito the next day; however, Saporito said he would be out sick until December 12 for medical disorders related to stress. T. 1254; 2035; RT. 124.

Odom decided to order Saporito to be examined by a company doctor because Odom wanted to learn whether Saporito's claim of being too ill to attend the November 30 meeting was legitimate and to determine if Saporito was physically fit to perform the duties of his job. T. 1454; 1456; RT. 124. When Saporito returned to work on December 12, he refused to see or be examined

by a company doctor. T. 2042. The next day, Saporito suggested to Kappes that the company doctor speak with his doctor as a way of resolving these issues. Kappes agreed on the condition that the company doctor found the communication with Saporito's physician sufficient to make a determination regarding Saporito's medical condition. T. 2048-49.

Kappes learned the next day that the company doctor, Dr. Richard Dolsey, had concluded that he still needed to examine Saporito to give his opinion whether Saporito had been too ill to attend the November 30 meeting with Odom and whether he was physically fit to perform the duties of his job. T. 2050. When Odom learned this, he decided it was still necessary to order Saporito to be examined by Dr. Dolsey. Saporito was directed to be examined by the doctor on December 16. Saporito said he would go to the doctor's office but would not permit the doctor to examine him. T. 2051. On December 16 Kappes and Odom received word that Saporito had gone to the doctor's doctor's office but had refused to be examined. T. 2053; RT. 127; *see also* T. 836; RT. 790.[6]

Odom concluded that Saporito's refusal to be examined by the company doctor was another act of insubordination and decided to discharge Saporito. T. 1482; RT. 127. The discharge notice gave three reasons for firing Saporito: 1) refusal on November 23, 1988, to comply with Odom's order to provide information about activities at the plant that could affect public health and safety, for which Saporito's access to vital areas and radiation controlled areas was restricted; 2) refusal to hold over for a meeting with Odom on November 30, 1988, for which Saporito was suspended indefinitely; and 3) refusal of an order on December 16, 1988, to be examined by the designated company doctor. R-104.

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[6] Dr. Dolsey wrote a detailed letter to FP&L explaining what happened when Saporito came to his office on December 16, which corroborates what Odom was told about the outcome of Saporito's visit to the doctor's office. Dr. Dolsey reported that Saporito "said very vehemently that he would not allow [Dr. Dolse]" to examine him. R-115. A union representative, who accompanied Saporito to the doctor's office and sat with him in the examining room, confirmed to Odom that Saporito refused to be examined. T. 1589.

II. ALJ Decision

The ALJ held, consistent with the Secretary's Remand Order, that the only issue to be decided on remand was whether FP&L proved that it would have taken the same action against Saporito even if he had not engaged in protected activities. He concluded that FP&L carried its burden of proof. R. D. and O. at 32. The ALJ found that "either of the latter two insubordinate acts [*i.e.*, refusal to attend the November 30 meeting with Odom and refusal to follow the order to be examined by the company doctor] by itself would have justified Saporito's termination," and that "the evidence overwhelmingly compels this result when the two instances of insubordination are considered as a whole." *Id.* at 33.

The ALJ found that Saporito's reasons for not attending the November 30 meeting were "dubious, if not outright unbelievable." R. D. and O. at 35. Saporito's "shifting excuses" for not attending the meeting showed that Saporito lied to Kappes. *Id.* at 37. The ALJ concluded that, even if the refusal to attend the meeting had some protected aspect because one purpose of the meeting was to learn Saporito's safety concerns, Saporito "exceeded the bounds of protected conduct [when he] *blatantly lied* as to his reason for not following that order." R. D. and O. at 37 (emphasis in original). He also found that Saporito was "insolent" and mocked management by the manner in which he stated his refusal to attend the meeting. *Id.* at 36.

With regard to Saporito's refusal to be examined, the ALJ found that FP&L clearly explained to Saporito several times the reasons for requiring him to be examined by Dr. Dolsey, that they were valid reasons, and that the order would have been given even if Saporito had not engaged in protected activity. R. D. and O. at 39-41. The ALJ also rejected Saporito's argument that FP&L "orchestrated" the sequence of events leading to the order that Saporito be examined as a means of "luring" him into insubordination for which he could be discharged. R. D. and O. at 42. He found that FP&L could not have known that Saporito would refuse to attend the meeting with Odom on November 30, that Saporito would give as a reason for not attending that he was sick, that he would be on sick

leave for almost two weeks, or that Saporito would refuse to be examined by Dr. Dolsey. *Id.*

The ALJ concluded that FP&L did not fail to follow its progressive discipline policy with Saporito because Saporito was warned about the consequences of failure to attend the meeting with Odom and was first suspended for his refusal. R. D. and O. at 44. The ALJ relied on evidence that other employees received substantial discipline, including discharge in two cases, for insubordination. The ALJ concluded that Saporito's "repeated insubordination," which went beyond the bounds of protected activity, was the cause of his termination, and that FP&L proved that these acts of insubordination "would have led to Saporito's termination even if he had not insisted on his right to speak directly with the NRC." R. D. and O. at 45.

DISCUSSION

I. Procedural Issues

A. Timeliness of Respondent's Reply Brief

Because Saporito's initial brief did not conform to the type size and style limitations of the briefing schedule, FP&L was given an opportunity to file a longer reply brief within 30 days of receipt of the order granting the right to file such a brief. Saporito argues that FP&L's reply brief was untimely filed because he received a copy of the Board's order on February 24 and FP&L's brief was filed with the Board on March 27, that is, 31 days later. However, FP&L stated in its response to Saporito's motion that it received the order granting leave to file a longer reply brief on February 25, and the return receipt for delivery of the order by certified mail shows a delivery date of February 25. FP&L's reply brief was timely filed.

B. Motion to Strike Part of FP&L's Reply Brief

Saporito also moved to strike a portion of FP&L's reply brief that asserted that FP&L was not allowed to introduce evidence about Saporito's employment history with FP&L before he arrived at the Turkey Point nuclear plant in April 1988. That portion of FP&L's

brief was simply a statement of its disagreement with the ALJ's ruling. Saporito's motion to strike is denied.

C. Motions for Remand and Reconsideration

Saporito moved to remand the entire case to give him an opportunity to amend his complaint to cover events that occurred at the St. Lucie nuclear power plant before he arrived at Turkey Point in April 1988. Those events occurred long before the ERA's then 30 days statute of limitations, and any action on them is now time barred. The motion to remand is denied.

Saporito also moved for reconsideration and remand of Case No. 89-ERA-07, which alleged that FP&L engaged in harassment of Saporito for his protected activity. That motion and accompanying memorandum only repeats arguments raised before the Secretary. In his June 3, 1994 Decision and Remand Order, the Secretary adopted the ALJ's conclusion that the alleged acts of retaliatory discipline and harassment "were not 'casually related to . . . [Saporito's] protected activity." Slip op. at 3. The motion for reconsideration and remand of Case No. 89-ERA-07 is denied.

D. Motion to File Second Rebuttal Brief

Saporito also moved for leave to file a second rebuttal brief to respond to new arguments raised in FP&L's second reply brief. That motion is granted.

II. The Merits

The Secretary held in his Remand Order that when FP&L discharged Saporito, it was motivated, at least in part, by an illegitimate reason: Saporito's refusal to reveal his safety concerns to Odom on November 23. R. O. at 6-7. The issue before us now is whether, under the dual motive analysis which is applicable under the circumstances of this case, FP&L has proven that it would have discharged Saporito even if, on November 23, he had not insisted on his right to reveal his safety concerns only to the NRC. *Pogue. V. U.S. Dep't of Labor*, 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (Dual motive test set forth in *Mt. Healthy City School District v. Doyle,*

429 U.S. 274 (1977), applies where it was "undisputed" that complainant engaged in protected activity and "that this was a motive for disciplinary action"); *Passaic Valley Sewerage Commissioners v. United States Dep't of Labor*, 992 F.2d 474, 481 (3rd Cir.), *cert. denied*, 114 S.Ct. 439 (1993). We agree with the ALJ that FP&L has carried this burden. We turn to an examination of each incident to determine whether Saporito's conduct gave FP&L legitimate grounds for discharge.

A. Refusal to Holdover and Attend Meeting with Odom

Odom decided he wanted to meet with Saporito on November 30 for three reasons: to discuss the conditions under which Saporito would be provided the Plant Work orders he had requested; to determine whether Saporito actually understood what a nuclear safety concern was; and to ask Saporito what his concerns were because Odom had learned that Saporito had begun to reveal those concerns to the outside investigators and thought that Saporito might be ready to reveal them to Odom. T. 1444; RT. 117-18.

The information Odom received about Saporito's response was that Saporito, in front of other employees, had refused to meet with Odom after being given a direct order by both Harley and Kappes. T. 1794-95; RT. 120. Odom also learned that Saporito had given changing reasons for refusing to attend the meeting: first that he had no safety concerns; then that he had personal family matters to attend to; and finally that he was sick. In light of Saporito's shifting justifications for his refusal to holdover to attend the meeting with Odom, Saporito's refusal appeared to Odom to be a clear act of insubordination. T. 1451. We agree with the ALJ that FP&L could have discharged Saporito for that reason alone.

In this regard we find it significant that FP&L did not immediately discharge Saporito after the November 30 incident, but instead suspended him. Indeed, FP&L proved that Saporito's suspension was consistent with discipline (including discharge, suspension, and demotion) it had meted out to other employees under similar circumstances. *See* R-111.

We also reject Saporito's argument that by refusing to attend the meeting with Odom, Saporito was insisting on his right to reveal his safety concerns only to the NRC. First, Saporito never stated as a reason for not attending the meeting with Odom that he did not want to be interrogated about his safety concerns.

Second, the mere fact that one of Odom's objectives in meeting with Saporito was to ask again about Saporito's safety concerns did not insulate Saporito from all directives given by his employer. "Even when an employee has engaged in protected activities, employers legitimately may discharge for insubordinate behavior, work refusal, and disruption." *Abu-Hjeli v. Potomac Electric Power Co.*, Case No.89-WPC-1, Sec'y Dec., Sept. 24, 1993, slip op. at 17, citing *Duram v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986). This is not a situation in which an emloyee's alleged insubordination was "the result and manifestation of his proteced activity." *Dodd v. Polysar Latex*, Case No. 88-SWD-0004, Sec'y. Dec., Sept. 22, 1994, slip op. at 15-16. Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns;[7] however, because of Saporito's refusal to meet with Odom, this scenario is not before us.

A situation similar to this case arose in *Yule v. Burns Int.'l. Security Service*, Case No. 93-ERA-12, Sec'y. Dec., May 24, 1995, where an employee who had engaged in protected conduct refused to follow an order to sign a training document indicating she had

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[7] In his Remand Order, the Secretary held that Saporito's attempt to by-pass the employer's "chain of command" in favor of speaking directly with the Nuclear Regulatory Commission was protected by the ERA. Remand Order at 1. *See also*, Sec. Order, Feb. 16, 1995. However, we note that by the time Saporito refused to meet with Odom on November 30, 1988, he had already begun meeting with FP&L's outside investigator with regard to his safety concerns. The Secretary did not reach the issue whether an employee, having initiated discussions with the company or the company's agents with regard to environmental or nuclear safety concerns, may then abruptly refuse to cooperate in reporting safety concerns absent unusual intervening circumstances.

received it and understood its contents. The Secretary held that the respondent proved it would have discharged the complainant for this insubordination even if she had not engaged in protected activities. *Yule*, slip op. at 13-14. the Secretary in *Yule* found that the employee did not make a statement that signing the training document was a "cover-up to the NRC," and that his analysis would have been very different if the employee had made such a statement. *Yule*, slip op. at 10 and n.8. Similarly, our analysis in this case would also have been different if Saporito had gone to the meeting with Odom but refused to reveal his safety concerns when asked. However, in the circumstances of this case, the ERA does not protect him from disciplinary action for refusing to attend the meeting at all.

Saporito also argues that the reason he did not want to meet Odom on November 30 was that he did not want to be questioned about his safety concerns, and that he feared retaliation and harassment. But Saporito himself testified that the reasons he gave Kappes for not attending the meeting were that he had family business to attend to and that he was sick, not that he did not want to be questioned about his safety complaints. T. 919-20.

Finally, Saporito cites National Labor Relations Act cases to support his argument that Odom's request that Saporito meet with him violated the ERA because that order tended to coerce Saporito into refraining from exercising his rights under the Act. The courts have applied a multi-factor test to determine whether employer interrogation about protected activities tends to be coercive. One of the factors to be considered is whether the employer had a valid purpose in questioning the employee. *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 928 (5th cir. 1993). In *NLRB v. Brookwood Furniture Div. of U.S. Indus.* 701 F.2d 452, 460-462 (5th Cir. 1983), the court held that questioning of employees about union activities is not illegal *per se*, and noted that in none of the alleged instances of coercive interrogation did the employer have a valid purpose for questioning employees about their support for a union. Here, Odom clearly had a valid purpose in wanting to question Saporito about his safety concerns: to learn whether any of those concerns had immediate significance for public health and safety. Moreover, Odom had other valid reasons to need to speak with Saporito, most important his need to set up a procedure for

Saporito to have access to the PWOs. We hold that Odom's attempt on November 30 to question Saporito about his safety concerns and to meet with him about making the PWOs available did not have the effect of coercing Saporito into refraining from exercising his right under the ERA to contact NRC about his safety concerns.

In light of Saporito's shifting explanations for his refusal to meet with Odom, and his failure to invoke any legitimate ERA-related reason for declining to meet. FP&L has established that Odom was justified in taking disciplinary action against Saporito for his refusal to meet with Odom.

B. Refusal to be Examined by Designated Doctor

Saporito gave different reasons for refusing to meet with Odom on November 30, saying first that he had to attend to family matters and then stating he was sick and could not stay for the meeting. This inconsistency raised questions in Odom's mind about whether Saporito was in fact too ill to meet with him; it impressed Odom as a "fabrication." RT. 788. Saporito then told Kappes the next day that he would be on sick leave until December 12 for medical disorders related to stress. Odom reasonably became concerned about Saporito's physical ability to perform his job and decided Saporito should be examined by the designated company doctor.

Later Odom was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctors office, that Saporito had refused to be examined by the doctor.[8] RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which, taken together with the refusal

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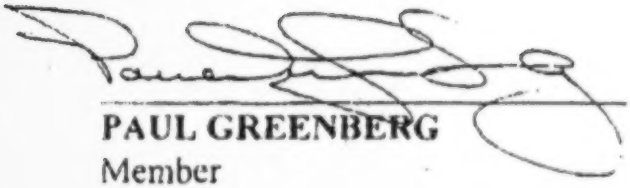
[8] Saporito argues that he never explicitly refused to be examined. The record shows that Saporito did not *say* explicitly that he refused to be examined, but his *actions* in repeatedly asking the doctor questions had the same effect. The doctor told the FP&L representative who accompanied Saporito to the doctor's office that Saporito had refused to be examined and testified to that effect at the first hearing. T. 628-630. Under the circumstances, FP&L was justified in concluding that Saporito had refused the examination.

to meet with him on November 30, appeared to Odom to be gross insubordination. Odom believed that Saporito's behavior of picking and choosing which orders would be obeyed could not be tolerated. T. 1483; RT. 797. Although Odom was aware that firing Saporito might look bad under the circumstances, he felt that the potentially negative impact of the discharge was outweighed by the gravity of Saporito's insubordination, which was common knowledge at the plant and which would set a bad precedent if not addressed by management. RT. 769; 797.

This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas*, slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to the examination. *Diaz-Robaines*, slip op. at 20. In this case, I contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended sick leave for medical disorders which he asserted were related to stress.

We join the ALJ in finding that FP&L has proven by a preponderance of the evidence that it would have discharged Saporito for his insubordination in refusing to attend a meeting with Site Vice President Odom and refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. Accordingly, the complaint in this case is **DISMISSED.**

SO ORDERED.



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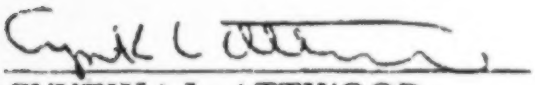

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Acting Member

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : ***Thomas J. Saporito, Jr., v. Florida Power & Light Company***

ARB CASE NO. : **98-008**

ALJ CASE NOS.: **89-ERA-7, 89-ERA-17**

DOCUMENT : **Final Decision and Order**

A copy of the above-referenced document was sent to the following persons on

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(3)

No. 05-717

In The

SUPREME COURT of the UNITED STATES

THOMAS SAPORITO,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

(1) WHETHER THE ELEVENTH CIRCUIT COUT OF APPEALS CORRECTLY HELD THAT RES JUDICATA BARRED ANY FURTHER REVIEW OF THE MERITS OF THIS CASE WHERE:

(A) FINAL JUDGMENT WAS ENTERED BY THE ELEVENTH CIRCUIT SIX YEARS PRIOR TO THE FILING OF THE INSTANT PETITION FOR A WRIT OF CERTIORARI BASED UPON THE SAME FACTS AND CLAIMS AND WHERE PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL HIS CLAIMS;

(B) NO NEW AND SUBSTANTIALLY DIFFERENT EVIDENCE HAS EMERGED IN THE INTERIM;

(C) THERE HAS BEEN NO CONTRARY CONTROLLING AUTHORITY ISSUED IN THE INTERIM; AND

(D) THE EARLIER RULING WAS NOT CLEARLY ERRONEOUS AND HAS NOT WORKED ANY MANIFEST INJUSTICE IN THIS CASE.

(2) WHETHER THIS COURT HAS JURISDICTION TO REVIEW A FINAL ORDER OF THE ELEVENTH CIRCUIT COURT OF APPEALS ENTERED OVER SIX YEARS PRIOR TO THE INSTANT PETITION FOR A WRIT OF CERTIORARI.

CORPORATE DISCLOSURE STATEMENT

1. FPL Group, Inc. 700 Universe Boulevard, Juno Beach, FL 33408

2. Florida Power and Light Company, a wholly owned subsidiary of FPL Group, Inc., 700 Universe Boulevard, Juno Beach, FL 33408

TABLE OF CONTENTS

	Page
Restatement of Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Restatement of The Case.....	1
A. Summary of Pertinent Record Facts	1
B. Summary of Procedural History	1
Reasons for Denying the Writ	5
A. The Petition For Writ Of Certiorari Should Be Denied Because It Fails To Set Forth Any Basis For Certiorari Review.....	5
B. The Petition For Writ Of Certiorari Should Be Denied Because The Petition Is Untimely As To The Board's And The Eleventh Circuit's Prior Orders	6
C. Principles Of Equity And Justice Dictate That The Petition For Writ Of Certiorari Be Denied In Order To Bring Finality To This Litigation	6
Conclusion	8

TABLE OF CITED AUTHORITIES

Cases:	Page
Conway v. Chemical Leaman Tank Lines, Inc., 644 F.2d 1059 (5th Cir. 1981).	7
Jefferson v. City of Tarrant, 522 U.S. 75 (1997)	8
Litman v. Mass. Mut. Life Ins. Co., 825 F2d 1506 (11th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).	7
Nevada v. United States, 463 U.S. 110 (1983)	4
New Haven Inclusion Cases, 399 U.S. 392 (1970)	6, 7
Pub. Utils. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943).	8
Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 98-008, 1998 WL 470668 (Aug. 11, 1998)	2
Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 04-079, 2004 WL 3038071 (Dec. 17, 2004)	3, 4
Saporito v. U.S. Dep't of Labor, 192 F.3d 130 (1999) (per curiam), reh'g en banc denied, 210 F.3d 395 (11th Cir. 2000) (unpublished table decision)	3
Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005)	6, 7
Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924).	5
U.S. v. The Ohio Power Co., 353 U.S. 98, 109 (1957)	8

Statutes:	Page
42 U.S.C. § 5851	1
Rules:	
Federal Rules of Civil Procedure 60(b)(6)	3
U.S. Supreme Court Rule 10	5
U.S. Supreme Court Rule 13.1	6

RESTATEMENT OF THE CASE

A summary of the material facts and procedural history in this case is set forth below.

A. Summary Of Pertinent Record Facts.

Petitioner, Thomas Saporito ("Saporito"), worked for Florida Power & Light Company ("FPL") from 1982 until December 22, 1988, in various positions at several of FPL's nuclear and non-nuclear power plants. Saporito's last position worked was as an Instrument and Controls Specialist at FPL's Turkey Point nuclear plant in south Florida.

In November 1988, FPL's Site Vice President at Turkey Point (John Odom) directed, on more than one occasion, that Saporito appear for a meeting with Mr. Odom to discuss alleged nuclear safety concerns held by Saporito. Saporito refused to attend the meeting and was subsequently suspended for gross insubordination. Mr. Odom held the suspension in abeyance until an investigation into the alleged safety concerns could be completed.

When informed that he must report back to work, Saporito informed FPL that he would be out sick for two weeks for medical disorders related to stress. Upon Saporito's return to work after the two-week period, Mr. Odom ordered a fitness-for-duty exam of Saporito pursuant to FPL policy. Saporito refused to be examined. As a result, Mr. Odom terminated Saporito's employment with FPL for continued gross insubordination.

B. Summary Of Procedural History.

This proceeding arises under Section 210 (now 211) of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, and stems from complaints filed by Saporito with the United States Department of Labor ("DOL") in 1989. In his DOL complaints, Saporito alleged that he was subjected to harassment and discriminatory treatment (Case No. 89-ERA-7) and later

discharged (Case No. 89-ERA-17) because he engaged in certain activities protected by the ERA.

The two cases were consolidated for the initial hearing, which was held in February 1989. Following that hearing, Administrative Law Judge Anthony J. Iacobo issued a Recommended Decision and Order denying Saporito's complaints (dated June 30, 1989).

Five years later, the Secretary of Labor issued a Decision and Remand Order (dated June 3, 1994). In that Decision, the Secretary found in favor of FPL and held that he agreed with Judge Iacobo's Recommended Decision that the allegations of harassment and retaliatory discipline encompassed in Case No. 89-ERA-7 were not causally related to any protected activity in which Saporito may have engaged. In the Decision and Remand Order, however, the Secretary of Labor disagreed with Judge Iacobo's Recommended Decision with respect to Case No. 89-ERA-17, and remanded the case to Judge Iacobo for a "dual motive" determination of "whether FPL would have discharged Saporito for the unprotected aspects of his conduct" which related to his protected activity.

On February 16, 1995, the Secretary of Labor issued an Order indicating that his June 3, 1994 Decision and Remand Order should not be interpreted as giving an employee an absolute right to refuse to report safety concerns to plant management. Instead, the Secretary stated that an employee's right to bring concerns to the Nuclear Regulatory Commission ("NRC") is separate from his duty to reveal his safety concerns to management. In other words, the Secretary stated that an employer may discipline an employee for refusing to reveal his safety concerns to management, even though it may not discipline an employee for taking information directly to the NRC.

The hearing on remand was held in January 1997. Because Judge Iacobo had retired, the case was reassigned to Administrative Law Judge David W. DiNardi.

Following that hearing, Judge DiNardi issued a Recommended Decision and Order on Remand (dated October 5, 1997). On August 11, 1998, the Administrative Review Board (the "Board") issued a Final Decision and Order in which it agreed with the DiNardi decision and dismissed the Complaint, finding that FPL would have discharged Saporito for his insubordination, even if he had not engaged in protected activity. See Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 98-008, 1998 WL 470668 (Aug. 11, 1998) ("ARB-1998"). Saporito appealed the Board's decision in that case to the Eleventh Circuit Court of Appeals in 1999. The Eleventh Circuit affirmed the Board's decision, and subsequently denied Saporito's motion for rehearing en banc. See Saporito v. U.S. Dep't of Labor, 192 F.3d 130 (1999) (per curiam), reh'g en banc denied, 210 F.3d 395 (11th Cir. 2000) (unpublished table decision). The Eleventh Circuit found that "[Saporito's] complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also find that Saporito has failed to demonstrate that proper legal standards were not applied." Id. Saporito subsequently attempted to file a petition with this Court, but did not comply with filing deadlines.

On January 25, 2004, more than five years after the Board's final decision in ARB-1998 and four years after the Eleventh Circuit's affirmance of that decision, Saporito filed with the Board a Motion for Reconsideration of the Board's decision in ARB-1998. Then, on May 12, 2004, Saporito filed with the Board a Motion for New Trial pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. On or about June 7, 2004, Saporito filed a Supplemental Motion for Reconsideration. The Board denied Saporito's motions and dismissed the case, finding that the Eleventh Circuit's adjudication was final on the merits and, therefore, any further proceedings were barred by the doctrine of *res judicata*. See Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 04-079, 2004 WL 3038071 (Dec. 17, 2004)("ARB-2004"). Specifically, in its decision in ARB-2004, the Board denied Saporito's motions for reconsideration and new trial, reasoning that:

> The Eleventh Circuit decision is the final adjudication on the merits of Saporito's 1989 complaint. That decision stands as a complete bar to further review of the merits of Saporito's complaint. "[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2918 (1983) (internal citation omitted).

2004 WL 3038071 at *1.

On or about February 9, 2005, Saporito petitioned the Eleventh Circuit for review of the Board's decisions in ARB-2004; ARB 98-008, Case No. 89-ERA-7 and Case No. 89-ERA-17. On March 4, 2005, FPL moved to intervene in the pending appeal. The Eleventh Circuit granted FPL's motion on March 29, 2005. FPL then filed a Motion to Dismiss the appeal on the basis of *res judicata*. By order dated June 2, 2005, the Eleventh Circuit granted FPL's Motion to Dismiss. Saporito moved for reconsideration of the dismissal, which the Eleventh Circuit denied on July 21, 2005. Saporito filed the instant Petition for Writ of Certiorari on or about October 17, 2005, and a Supplemental Appendix on or about November 6, 2005 (on November 30, 2005, he filed a second copy of the same Supplemental Appendix).

REASONS FOR DENYING THE WRIT

A. The Petition For Writ Of Certiorari Should Be Denied Because It Fails To Set Forth Any Basis For Certiorari Review.

Pursuant to U.S. Supreme Court Rule 10, this Court has discretion to grant a petition for writ of certiorari where compelling circumstances exist, such as where the appellate court's decision is in direct conflict with an appellate court in another circuit or with a prior decision of the Supreme Court, or where the appellate court "has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10 clearly states that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See also Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924).

In this case, Saporito does not argue that the Eleventh Circuit's opinion is in direct conflict with the decision of another Circuit Court of Appeal or with relevant decisions from this Court. Nor does he argue that this case involves an important question of federal law. Rather, Saporito merely asserts, in essence, that the Eleventh Circuit erred by: (1) not applying a *de novo* standard of review; (2) not revisiting it's order from six years past; (3) applying the doctrine of *res judicata* to bar further review of the merits; and (4) finding that the Board's decision was supported by substantial evidence. Saporito then spends 14 pages of his Petition rehashing the facts presented in the forums below and explaining how those facts should be interpreted in his favor. Clearly, Saporito is improperly arguing the merits of his claim rather than providing this Court with a basis to grant certiorari review. Accordingly, his Petition should be denied.

B. The Petition For Writ Of Certiorari Should Be Denied Because The Petition Is Untimely As To The Board's And The Eleventh Circuit's Prior Orders.

In his Petition, Saporito uses the Eleventh Circuit's June 2, 2005 dismissal based on *res judicata* grounds to resurrect his now time-barred claim that this Court should grant certiorari review of the Eleventh Circuit's August 3, 1999 order upholding the Board's August 11, 1998 Final Decision and Order. Rule 13.1 of the Supreme Court Rules clearly mandates that a petition for writ of certiorari to review a judgment entered by a U.S. Court of Appeals in a civil case must be filed "within 90 days after entry of the judgment." Here, Saporito is attempting to have certiorari review granted over an appellate judgment entered six years ago. That judgment became final 90 days after its entry date of August 3, 1999, when Saporito failed to timely move this Court for certiorari review. Thus, the instant Petition must be denied. See, e.g., New Haven Inclusion Cases, 399 U.S. 392, 481 (1970) (holding that a party who "took no appeal" from an adverse order is "foreclosed by *res judicata*" from later seeking relief inconsistent with that order).

C. Principles Of Equity And Justice Dictate That The Petition For Writ Of Certiorari Be Denied In Order To Bring Finality To This Litigation.

In this case, Saporito is seeking certiorari review of the Eleventh Circuit's order declining to revisit, on *res judicata* grounds, its own order of six years prior. Specifically, Saporito believes the Eleventh Circuit erred by not allowing him to re-litigate the same claims stemming from complaints he originally filed in 1989, which were brought to final judgment six years ago when Saporito failed to timely seek certiorari review before this Court.

"Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case." Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289,